Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)))))	CC Docket No. 96-149

OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION TO PETITIONS FOR RECONSIDERATION

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, hereby opposes the petitions for reconsideration filed by US West, Inc. and BellSouth Corporation of the First Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding, FCC 96-489 (released Dec. 24, 1996)(Order). The Order sets forth structural separation and other non-accounting safeguards that are intended to implement the new Sections 271 and 272 of the Communications Act of 1934, the purpose of which is to ensure that BOC entry into new lines of business does not produce the same anticompetitive consequences as the former Bell System. Although, as explained in the petitions for reconsideration filed by MCI and AT&T, the safeguards set forth in the Order are not stringent enough to carry out fully the intent and language of Sections 271 and 272 of the Act, US West and BellSouth would have the Commission weaken the Order even further by removing a number of the few protections that the Order does provide. In each case, the changes they request are not required or even permitted by the statute and would not be in the public interest.

A. Section 272(a) Requires That All BOC InterLATA Information Services be Subject to Section 272(b)

Both US West and BellSouth have come up with the same inverted reading of Section 272(a)(2) of the Act, which lists the

types of BOC activities that are subject to the separation requirements of Section 272(b). Under their approach, a subsection of a provision can override the rest of the provision. Section 272(a)(2) states that a separate affiliate is required for: (A) Manufacturing; (B) "Origination of interLATA telecommunications services, other than" three categories of services; and (C) "InterLATA information services," with two exceptions. Even without examining the exceptions in subsections (B) and (C), and irrespective of those exceptions, it is clear that the exceptions in (B) cannot alter the meaning or scope of (C), or vice-versa. The exceptions in (B) can only whittle down the universe of all "interLATA telecommunications services" covered by the separation requirements.

US West and BellSouth claim, however, that the exceptions to (B) can limit the scope of (C), because some of the exceptions to (B), read independently, logically fall within (C). They argue that certain "incidental interLATA services," listed in subsection (B)(i), can be information services and that "out-of-region services," in subsection (B)(ii), include out-of-region information services. They conclude that since out-of-region information services are excepted by subsection (B)(ii), subsection (C) can only include in-region "interLATA information services," even though the "in-region" limitation does not appear in (C).

That interpretation clearly cannot be correct. First, where there is an exception to one provision in a statute that is omitted from a closely related provision, it must be assumed that

Congress intended to omit the exception in the latter provision.[1] Thus, Congress intended to omit any exception for out-of-region information services from subsection (C).

Second, the exception to subsection (B) in subsection (B)(ii) for "out-of-region services" cannot include services outside the universe of services in (B), which is the origination of interLATA telecommunications services. True, there are out-of-region information services, but that cannot modify the scope of subsection (B)(ii). The category of "interLATA telecommunications services, other than ... out-of-region services" would be in-region telecommunications services, not in-region telecommunications services and in-region information services. The exceptions following the phrase "other than" logically can only carve out categories of services that are also interLATA telecommunications services; otherwise, the phrase "other than" would make no sense.[2]

Their statutory construction argument also proves too much. If all of the exceptions in subsection (B) must be given the same expansive reading that US West and BellSouth would give

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[1] League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9th Cir. 1979).

[2] In effect, US West and BellSouth fail to follow their own logic. Under their reading, "interLATA telecommunications services, other than ... out-of-region services" means "interLATA telecommunications services, other than ... out-of-region information and telecommunications services." Since all interLATA telecommunications services are "other than" out-of-region information services, the partial exception for out-of-region information services has no effect on the universe of services covered by subsection (B). The only effect of subsection (B)(ii) is to remove out-of-region interLATA telecommunications services from the category covered by (B), leaving all interLATA information services in subsection (C).

subsection (B)(ii), subsection (C) would have to be read as exempting incidental interLATA information services, out-of-region interLATA information services, and previously authorized interLATA information services. The only exceptions that actually appear in subsection (C), however, are for electronic publishing and alarm monitoring services. Congress would not have explicitly listed only those two exceptions and omitted so many more that US West and BellSouth would read into subsection (C) if it had intended to exclude all of the latter as well from the separation requirements. Their reading of Section 272(a)(2) must therefore be rejected.

B. Section 272(b) Requires That No Entity Be Permitted to Perform Maintenance and Installation Services for Both a BOC and its InterLATA Affiliate

The Order finds that Section 272(b)(1) prohibits a BOC and its affiliates (other than its interLATA affiliate) from providing operating, installation and maintenance services associated with the facilities owned by its interLATA affiliate and prohibits the interLATA affiliate from providing such services associated with the BOC's facilities. Order at ¶¶ 15, 163. BellSouth challenges those prohibitions and requests that the Commission at least allow another affiliate to provide such services for both the BOC and its interLATA affiliate.

BellSouth argues that Section 272(b) is so detailed that Congress left no room for the Commission to add any restrictions to those specifically listed in subsections 272(b)(1) through (5). Moreover, according to BellSouth, the requirement in Section 272(b)(1) that a BOC's interLATA affiliate "operate independently" from the BOC does not give the Commission

authority to supplement the restrictions in Section 272(b)(2) through (5). It points out that Section 274(b) specifically prohibits a BOC from providing installation and maintenance services for its separated electronic publishing affiliate and argues that this explicit prohibition shows that such a requirement is not otherwise inherent in a general requirement that a BOC and its affilate operate independently. Finally, BellSouth argues that Section 272(b)(1) imposes no restrictions other than on the relationship of a BOC to its interLATA affiliate and thus does not preclude other affiliates or the parent from providing services to the BOC or the interLATA affiliate.

BellSouth's approach begs the question. That there are other requirements explicitly listed in Section 272(b), in addition to the "operate independently" requirement in Section 272(b)(1), does not resolve the issue of how to interpret Section 272(b)(1). BellSouth admits that the phrase "operate independently" is taken from the Computer II rules, but those rules required the Computer II affiliate to have its own personnel for installation, maintenance and other functions.[3/] BellSouth does not explain how the requirements listed in Sections 272(b)(2)-(5) can make Computer II any less reliable as precedent in giving meaning to the phrase "operate independently" in Section 272(b)(1) or why Section 272(b) must be interpreted as

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[3] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384, 477 (1980), mod. on recon., 84 FCC 2d 50 (1981), mod. on further recon., 88 FCC 2d 512 (1981), aff'd sub nom. CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

if subsection (b)(1) did not exist.

BellSouth is also confused about how to apply canons of statutory construction. It argues that since Section 272(b)(2)-(5) does not include an explicit requirement that the BOC and its interLATA affiliate not perform installation and maintenance services for each other, the doctrine of expressio unius est exclusio alterius precludes any interpretation of Section 272(b) that includes any such rule. The problem with this reasoning, of course, is that subsections (1) through (5) of Section 272(b) are parallel, independent provisions. What subsections (b)(2) through (b)(5) contain sheds no light on how to interpret the "operate independently" requirement in subsection (b)(1). The expressio unius doctrine cannot be meaningfully applied until one knows what has been "expressed," and BellSouth's approach does not help to define what subsection (b)(1) expresses. Thus, that doctrine does not support BellSouth's conclusion as to what restrictions were meant to be excluded from the coverage of Section 272(b)(1) through (5).

BellSouth is equally confused as to the implications of Section 274(b). That subsection 7 of Section 274(b) explicitly includes a prohibition on BOC provision of installation and maintenance service for its electronic publishing affiliate does not suggest anything about the interpretation of the phrase "operate independently" in Section 272(b). Unlike the role of the "operate independently" requirement in Section 272(b), the "operated independently" requirement in Section 274(b) is not one of the independent subsections thereof, but, rather, is in the introductory language of subsection (b) and thus subsumes all of

the numbered subsections under it. Since the "operate independently" requirement in Section 272(b)(1) is only one of five separate subsections, however, what is contained in the others sheds no light on that phrase. Thus, the different structures of Sections 272(b) and 274(b) defeat BellSouth's attempted link.

Moreover, given the structure of Section 274(b), its numbered subsections, including (b)(7)'s restriction on installation and maintenance, amplify the meaning of "operated independently" in the introductory language of Section 274(b). Thus, to the extent that Section 274(b) sheds any light on the interpretation of Section 272(b), the phrase "operate independently" in Section 272(b) should be read to include all of the restrictions subsumed within the phrase "operated independently" in Section 274(b). The absence of any explicit mention of restrictions on the provision of installation and maintenance in Section 272(b), therefore, if it implies anything, suggests only that there was no need to mention such restrictions, since they were already subsumed under the "operate independently" rubric in Section 272(b)(1). If, on the other hand, the meaning of that requirement in Section 274(b) is entirely irrelevant to its meaning in Section 272(b), as the Commission has found,[4] BellSouth's connection between the two must be rejected in any event, leaving the Computer II rules as the only significant guidance on the meaning of "operate

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[4] AT&T correctly argues that the Commission has not adequately explained that determination. See Comm'r of Internal Revenue v. Lundy, 116 S.Ct. 647, 655 (1996)(identical terms in related parts of a statute are intended to have same meaning).

independently" in Section 272(b)(1).

BellSouth's argument that another affiliate ought to be allowed to provide such services to both the BOC and its interLATA affiliate would simply allow an end run around the restrictions of Section 272(b), thereby undercutting the "operate independently" requirement. If a BOC and its interLATA affiliate could have such services provided through a third affiliate, they would no longer be operating independently, since their operations would be effectively delegated to the same entity. The third affiliate would, in effect, be operating the BOC and its interLATA affiliate in conjunction, raising all of the same cost allocation problems that the separation requirements were intended to alleviate. The restrictions challenged by BellSouth should therefore be retained.

C. The Definition of "Marketing and Sale of Services" in Section 272(g) Should Not be Expanded to Include Product Development and Strategy

The Order finds that the "joint marketing and sale of services" exempted by Section 272(g)(3) from the nondiscrimination requirement of Section 272(c)(1) does not include product development and strategy. Thus, if a BOC performs any product development or strategy for its interLATA affiliate, it must offer such services to others on a nondiscriminatory basis. Order at ¶ 296. BellSouth finds it abhorrent that a BOC should have to provide such services on a nondiscriminatory basis and requests that the exemption for joint marketing be expanded to cover product development and strategy. It argues that such efforts will be required to determine the nature and extent of the services that a BOC will market and sell

and that since marketing is exempt from the nondiscrimination requirement, these predicate activities should also be exempt.

The problem with BellSouth's approach is that it would provide no basis for drawing a line between exempt marketing and any other activity. Almost any aspect of a BOC's operations could be considered to be "required" in order to successfully market its services and thus exempt from Section 272(c)(1). BellSouth's standardless view of the Section 272(g)(3) exemption would eliminate Section 272(c)(1) completely.

Moreover, BellSouth does not explain how such an approach is consistent with the "operate independently" requirement in Section 272(b)(1). If a BOC designs and develops its affiliate's services, they will hardly be operating independently. In discussing the operate independently requirement, the Order states:

> In construing other provisions of section 272, we address the concerns of those commenters who urge us to interpret section 272(b)(1) to prohibit a BOC and a section 272 affiliate from engaging in various forms of joint research and development. ... To the extent that a BOC seeks to develop services for or with its section 272 affiliate, the BOC must develop services on a nondiscriminatory basis for or with other entities, pursuant to section 272(c)(1).

Order at ¶ 169. Thus, the nondiscrimination and separation requirements of Section 272 reinforce each other as to such activities. A BOC's natural reluctance to develop other interexchange carriers' (IXCs') services for or with them will force it to keep its distance from its affiliate's service development. BellSouth does not even mention this portion of the Order in its discussion of this issue.

To the extent that BOCs are more restricted than IXCs in

this regard, it must be kept in mind that there are no separation requirements for IXCs. In light of the overall statutory scheme, as well as the ordinary usage of the terms "sale" and "marketing," the Section 272(g)(3) exemption for BOC joint marketing must be strictly limited and thus should not be expanded to encompass other activites that may be useful or necessary for joint marketing, such as product development and strategy.

D. The Restriction in Section 271(e) Requires No Further Clarification at This Time

US West requests that the Order be modified to clarify the restriction in Section 271(e) governing joint marketing by the large IXCs. US West appears to be concerned that once a customer has signed up for both resold local service and interLATA service from one of the large IXCs, the IXC will consider itself to be free of any of the restrictions in Section 271(e) as to that customer, particularly the restriction on bundled offerings of resold local and interLATA services. US West's concern appears to be fully addressed in paragraph 277 of the Order, however, and no further clarification is necessary at this time.

Conclusion

For the reasons stated above, the petitions for reconsideration filed by US West and BellSouth should be denied.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By: Frank W. Krogh

Frank W. Krogh
Mary L. Brown
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2372

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CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that a true copy of the foregoing "OPPOSITION TO PETITIONS FOR RECONSIDERATION" was served this 2nd day of April, 1997, by hand-delivery or first-class mail, postage prepaid, upon each of the following persons:

Gary L. Philips
Ameritech
1401 H Street, N,W.
Suite 1020
Washington, DC 20005

David W. Carpenter
Peter D. Keisler
AT&T Corp.
One First National Plaza
Chicago, IL 60603

Mark C. Rosenblum
Leonard J. Cali
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

Edward Shakin
Lawrence W. Katz
Bell Atlantic Telephone Companies and Bell Atlantic Communications, Inc.
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

Walter H. Alford
John F. Beasley
William B. Barfield
Jim O. Llewellyn
Bellsouth Corporation
1155 Peachtreet Street, N.E.
Suite 1800
Atlanta, GA 30309-2641

David G. Frolio
David G. Richards
Bellsouth Corporation
1133 21st Street, N.W.
Washington, DC 20036

Patrick S. Berdge
Public Utilities Commission of the State of California
505 Van Ness Ave.,
San Francisco, CA 94102

Danny E. Adams
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Washington, DC 20036

Thomas K. Crowe
Law Offices of Thomas K. Crowe, P.C.
Excel Telecommunications, Inc.
2300 M Street, N.W.
Suite 800
Washington, DC 20037

Cynthia B. Miller
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Michael J. Shortley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, New York 14646

Jonathan Jacob Nadler
Squire, Sanders & Dempsey
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, DC 20004

Daniel C. Duncan
Information Industry Association
1625 Massachusetts Ave., N.W.
Suite 700
Washington,DC 20036

Andrew D. Lipman
Swidler & Berlin, Chartered
3000 K Street, N.W.
Suite 300
Washington, DC 20007

William J. Celio
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48910

Eric Witte
Missouri Public Serivice Commission
P.O. Box 360
Jefferson City, MO 65102

Charles D. Gray
James Bradford Ramsay
National Association of Regulatory Utility Commissioners
1201 Constitution Ave
Suite 1102
P.O. Box 684
Washington, DC 20044

Blossom A. Peretz
New Jersey Division of the Ratepayers Advocate
31 Clinton Street, 11th Floor
Newark, NJ 07101

Mary E. Burgess
NYS Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Donald C. Rowe
NYNEX Corporation
111 Westchester Avenue
White Plains, NY 10604

Mary W. Marks
Southwestern Bell Telephone Company
One Bell Center
Room 3536
St. Louis, MO 63101

Leon M. Kestenbaum
Sprint Corporation
1850 M Street, N.W.
Suite 1110
Washington, DC 20036

John L. McGrew
Brian Conboy
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036

Alfred M. Mamlet
Steptoe & Johnson LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036

Teresa Marrero
Teleport Communications Group, Inc.
One Teleport Drive
Staten Island, NY 10311

Lesla Lehtonen
California Cable Television Association
4341 Piedmont Ave
P.O. Box 11080
Oakland, CA 94611

Mary McDermott
United States Telephone Association
1401 H Street, N.W.
Suite 600
Washington,DC 20005

Robert B. McKenna
Richard A Karre
US West, Inc.
1020 19th Street, N.W.
Washington,DC 20036

Ruth S. Baker-Battist
Voice-Tel
5600 Wisconsin Ave.,
Suite 1007
Chevy Chase,MD 20815

Joel Bernstein
Halprin, Temple, Goodman
and Sugrue
1100 New York Ave., N.W.
Suite 650E
Washington, DC 20005

Janice Myles
Common Carrier Bureau
Federal Communications
Division
Room 544
1919 M Street, N.W.
Washington, DC 20554

International Transcription
Service
1919 M Street, N.W.
Room 246
Washington, DC 20554

James H. Bolin, Jr.
AT&T Corp.
Room 3247H3
295 North Maple Avenue
Basking Ridge, NJ 07920

Teresa Marrero
Teleport Communications
Group, Inc.
One Teleport Drive
Staten Island, NY 10311

Richard J. Metzger
Association for Local
Telecommunications Services
1200 19th Street, N.W.
Suite 560
Washington, DC 20036

Werner K. Hartenberger
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, DC 20036

Sylvia Chukwuocha